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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LARRY W. DEPOORTER,
CRAIG G. WALLINGTON,
EDGAR A. CHOW,
ROBERT A. ODABASHIAN,
and DILIP K. BOAL

Appeal 2008-6268
Application 09/446,807
Technology Center 1700

Decided:¹ April 6, 2009

Before BRADLEY R. GARRIS, JEFFREY T. SMITH, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Appellants appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-23. We have jurisdiction under 35 U.S.C. § 6.

We AFFIRM-IN-PART.

STATEMENT OF THE CASE

Appellants claim a patch bag (claims 1, 2) and a process for making a patch bag (claim 14).

Representative independent claims 1, 2, and 14 read as follows:

1. An end-seal patch bag comprising a heat-shrinkable bag comprising a seamless tubular bag film, and a heat-shrinkable patch comprising a patch film, the patch being adhered to the bag, the patch extending across an entire width of a first lay-flat side of the tubular bag film, the patch bag having a seal across the bottom thereof, the seal being continuous across the entire width of the lay-flat bag film, the seal being through the patch as well as through both lay-flat sides of the bag, the seal being the only seal across the bag, the bag having a top which is not covered by the patch.

2. A patch bag comprising a heat-shrinkable bag comprising a tubular bag film, and a heat-shrinkable patch comprising a patch film, the patch being adhered to the bag, the patch bag having a seal which is through both the patch as well as through both lay-flat sides of the bag, the sealed bag having a burst strength of at least 26 inches of water in a Linear Ramp Hot Burst Grease Test.

14. A process for making a patch bag, comprising:

(A) adhering first patch film to an outside surface of a first lay-flat side of a lay-flat bag film tubing, the first patch having a width greater than the width of the lay-flat tubing;

(B) adhering second patch to an outside surface of a second lay-flat side of a lay-flat bag film tubing, the second patch also having a width greater than the width of the lay-flat tubing;

(C) sealing an inside surface of the film tubing to itself, the sealing being carried out by applying heat to each of the patch outside surfaces, the heat being applied by a first means for heating and a second means for heating, the first and second means for heating being in alignment with one another, with the patches and bag tubing therebetween during sealing; and

(D) cutting across the tubing.

The references set forth below are relied upon by the Examiner as evidence of unpatentability:

| | | |
|------------|--------------|---------------|
| Shabram | US 3,340,776 | Sep. 12, 1967 |
| Samson | US 3,616,004 | Apr. 2, 1969 |
| Herrington | US 4,561,109 | Dec. 24, 1985 |
| Brady | WO 96/00688 | Jan. 11, 1996 |

The Examiner rejects the claims on appeal as follows:

Under 35 U.S.C. § 102(b), claims 1-3 and 5-12 are rejected as being anticipated by Brady;

Under 35 U.S.C. § 103: claim 13 is rejected over Brady; claim 4 is rejected over Brady and Herrington; claims 14, 15, 17, 19, and 20 are rejected over Brady and Samson; and claims 16, 18, and 21-23 are rejected over Brady, Samson, and Shabram.

The Rejections of patch bag claims 1-13

ISSUES

Have Appellants shown error in the Examiner's (implicit) finding that Brady anticipatorily discloses the claim 1 limitation "the seal being the only seal across the bag"?

Have the Appellants shown error in the Examiner's (implicit) finding that Brady anticipatorily discloses the claim 2 limitation "the sealed bag

having a burst strength of at least 26 inches of water in a Linear Ramp Hot Burst Grease Test"?

FINDINGS OF FACT

In the § 102 rejection of claims 1 and 2 (Ans. 3-4), the Examiner finds that Brady discloses a supplemental end seal through both the patch and bag sides but makes no express findings as to whether Brady discloses the above quoted limitations of independent claims 1 and 2.

PRINCIPLES OF LAW

A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *Verdegaal Bros. v. Union Oil*, 814 F.2d 628, 631 (Fed. Cir. 1987).

ANALYSES

Appellants correctly argue that the Examiner considers Brady's supplemental end seal disclosure on page 19 as satisfying the seal limitations of claim 1 but that this supplemental end seal is additional to a bottom seal and accordingly "cannot possibly anticipate Appellants' Claim 1, which recites that the seal through the patch and the bag as being the ' . . . only seal across the bag" (App. Br. 8). The Examiner responds to this argument with the following rebuttal:

However, the rejection is intended to state that Brady et al teach that it is known in the art to make the bottom seal by sealing through both the patches and bag, as stated above; Brady et al clearly teaches the bottom seal as being the only seal across the bag, because the supplemental end seal is optional. The

rejection is not intended to state that the supplemental end seal is the only seal across the bag.
(Ans. ¶ bridging 9-10).

The Examiner's rebuttal is not well taken. While Brady discloses that the supplemental end seal is optional, the presence of this supplemental end seal is necessary in order to satisfy the non-contested claim 1 limitation "the seal being through the patch as well as through both lay-flat sides of the bag" (which is consistent with the Examiner's finding in the paragraph bridging pages 3 and 4 of the Answer). However, the presence of this supplemental end seal prevents satisfaction of the contested claim 1 requirement "the seal being the only seal across the bag." This is because the supplemental end seal is additional to Brady's bottom seal.

In short, whether Brady's supplemental end seal is present or absent, the resulting prior art bag would fail to satisfy each and every limitation of claim 1.

As for independent claim 2, Appellants argue that the Examiner has failed to show that Brady expressly or inherently describes the claim 2 limitation "the seal bag having a burst strength of at least 26 inches of water in a Linear Ramp Hot Burst Grease Test" (App. Br 10-14; Reply Br. 2-4). This is correct. Instead, the Examiner asserts that the burst strength recitation of claim 2 is indefinite (Ans. 10, second full para.). This assertion is not only irrelevant to the issue of anticipation but without perceptible merit particularly in light of Appellants' definition of burst strength in accordance with "Standard Linear Ramp Hot Burst Grease Test" (Spec. 6, ll. 21-27).

On this record, therefore, the Examiner has not even asserted that each and every limitation of claim 2 is expressly or inherently described by Brady.

CONCLUSIONS OF LAW

Appellants have shown error in the Examiner's (implicit) finding that Brady anticipatorily discloses the claim 1 limitation "the seal being the only seal across the bag."

Appellants have shown error in the Examiner's (implicit) finding that Brady anticipatorily discloses the claim 2 limitation "the sealed bag having a burst strength of at least 26 inches of water in a Linear Ramp Hot Burst Grease Test."

For these reasons, we cannot sustain the Examiner's § 102 rejection of claims 1-3 and 5-12 as being anticipated by Brady.

Because the Examiner's obviousness positions do not address the above discussed deficiencies of Brady, we also cannot sustain the § 103 rejections of claim 13 over Brady and of claim 4 over Brady and Herrington.

The Rejections of Process Claims 14-23

ISSUES

Have Appellants shown error in the Examiner's conclusion that it would have been obvious to form Brady's supplemental end seal via a process of applying heat with first and second heating means as taught by Samson (Ans. 6-7) and as required by independent claim 14?

Have Appellants shown error in the Examiner's obviousness conclusion regarding dependent claim 16 by identifying a claim limitation not satisfied by the applied references?

FINDINGS OF FACT

Appellants do not dispute the Examiner's finding that Brady discloses a process which corresponds to the claim 14 process except for sealing step (C) and that Samson discloses a process for sealing films which includes the claim 14 sealing step (C) (Ans. 6-7).

Appellants also do not dispute the Examiner's finding (i.e., with respect to dependent claim 16) that Shabram discloses a sealing bar having a convex surface (Ans. 8).

PRINCIPLES OF LAW

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1740 (2007).

Limitations are not to be read into the claims from the specification. *In re Van Guens*, 988 F.2d 1181, 1184-85 (Fed. Cir. 1993).

ANALYSES

Concerning independent claim 14, Appellants do not contest the Examiner's findings as previously mentioned but instead argue that one having ordinary skill in this art would not have combined Brady and Samson as proposed by the Examiner. According to Appellants, this is because the

bag and patch films which are to be sealed together in Brady "have melting points relatively close to one another" (App. Br. 17) whereas the films which are to be sealed together in Samson "are ' . . . ***each built up of two or more alternating layers of different thermoplastic component polymers having different softening points***' (SAMSON Col. 1, lines 7-9, emphasis added)" (*id.*). Appellants contend that "one of skill in the art would not have been motivated to apply the method or apparatus of SAMSON to produc[e] a through-the-patch seal of a patch bag of BRADY . . . , because neither the patch film nor the bag film in BRADY . . . contain[s] alternating layers of high and low melting point polymers" (App. Br. 19).

The deficiency of this contention is that Samson does not limit the sealing process to alternating layers of high and low melting point polymers which would thereby exclude the bag and patch film polymers of Brady. Rather, as acknowledged by Appellants (App. Br. 17), the sealing process of Samson is applied to alternating layers of polymers which have softening points that are merely different. Significantly, Appellants concede that the bag and patch films of Brady are made of different polymers "which have melting points relatively close to one another" (*id.*). While Brady's different polymers may have relatively close melting points, Appellants do not dispute that these melting points are nevertheless different. Therefore, regardless of whether the processes of Brady and Samson are from the same or different fields of endeavor, an artisan would have combined these processes in the manner proposed by the Examiner in order to form the supplemental end seal desired by Brady via a technique taught by Samson as effective for sealing together layers of different polymers having different softening points.

With respect to dependent claim 16, Appellants in essence argue that the Examiner's proposed combination of Brady and Shabram would not yield the claim feature of a seal bar having a convex surface. Appellants state that the elements of Shabram's sealing apparatus which the Examiner characterizes as having a convex surface "are *alignment means* for use in conjunction with other elements which apply the heat to make the seal" (App. Br. 22). According to Appellants, these elements "do not participate directly in the formation of the heat seal, i.e., unlike Appellants' seal bars, they do not contact the films to make the seal" (*id.*).

However, as correctly explained by the Examiner (Ans. 11, last para.), claim 16 does not require that the convex surface thereof must "contact the films to make the seal" (App. Br. 22) as argued by Appellants. It follows that Appellants' argument is unpersuasive because claim 16 is not limited in the manner argued and because limitations from the Specification are not to be read into the claim.

CONCLUSIONS OF LAW

Appellants have not shown error in the Examiner's conclusion that it would have been obvious to form Brady's supplemental end seal via a process of applying heat with first and second heating means as taught by Samson (Ans. 6-7) and as required by independent claim 14.

Appellants have not shown error in the Examiner's obviousness conclusion regarding dependent claim 16 by identifying a claim limitation not satisfied by the applied references.

As a consequence, we sustain the § 103 rejections of independent claim 14 over Brady and Samson and of dependent claim 16 over Brady, Samson, and Shabram. We also sustain these rejections as respectively

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applied against claims 15, 17, 19, and 20 and against claims 18 and 21-23 since these dependent claims have not been separately argued by Appellants with any reasonable specificity.

SUMMARY

We have sustained the rejections of process claims 14-23 but not the rejections of patch bag claims 1-13.

ORDER

The decision of the Examiner is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(v)(2008).

AFFIRMED-IN-PART

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